

specimens under the authority or procedures of this subject unless the railroad has made the determinations required by this section, based upon reasonable inquiry and good faith judgment. A railroad does not act in excess of its authority under this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment, but it is later determined, after investigation, that one or more of the conditions thought to have required testing were not, in fact, present. However, this section does not excuse the railroad for any error arising from a mistake of law (e.g., application of testing criteria other than those contained in this part).

(3) A railroad is not in violation of this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment but nevertheless errs in determining that post-accident testing is not required.

(4) An accident/incident with respect to which the railroad has made reasonable inquiry and exercised good faith judgment in determining the facts necessary to apply the criteria contained in paragraph (a) of this section is deemed a qualifying event for purposes of specimen analysis, reporting, and other purposes.

(5) In the event specimens are collected following an event determined by FRA not to be a qualifying event within the meaning of this section, FRA directs its designated laboratory to destroy any specimen material submitted and to refrain from disclosing to any person the results of any analysis conducted.

**§219.203 Responsibilities of railroads and employees.**

(a) *Employees tested.* (1)(i) Following each accident and incident described in §219.201, the railroad (or railroads) must take all practicable steps to assure that all covered employees of the railroad directly involved in the accident or incident provide blood and urine specimens for toxicological testing by FRA. Such employees must cooperate in the provision of specimens as described in this part and Appendix C to this part.

(ii) If the conditions for mandatory toxicological testing exist, the railroad

may also require employees to provide breath for testing in accordance with the procedures set forth in part 40 of this title and in this part, if such testing does not interfere with timely collection of required specimens.

(2) Such employees must specifically include each and every operating employee assigned as a crew member of any train involved in the accident or incident. In any case where an operator, dispatcher, signal maintainer or other covered employee is directly and contemporaneously involved in the circumstances of the accident/incident, those employees must also be required to provide specimens.

(3) An employee must be excluded from testing under the following circumstances: In any case of an accident/incident for which testing is mandated only under §219.201(a)(2) (an “impact accident”), §219.201(a)(3) (“fatal train incident”), or §219.201(a)(4) (a “passenger train accident with injury”) if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) or severity of the accident/incident. The railroad representative must consider any such information immediately available at the time the qualifying event determination is made under §219.201.

(4) The following provisions govern accidents/incidents involving non-covered employees:

(i) Surviving non-covered employees are not subject to testing under this subpart.

(ii) Testing of the remains of non-covered employees who are fatally injured in train accidents and incidents is required.

(b) *Timely specimen collection.* (1) The railroad must make every reasonable effort to assure that specimens are provided as soon as possible after the accident or incident.

(2) This paragraph (b) must not be construed to inhibit the employees required to be tested from performing, in the immediate aftermath of the accident or incident, any duties that may be necessary for the preservation of life or property. However, where practical, the railroad must utilize other employees to perform such duties.

(3) In the case of a passenger train which is in proper condition to continue to the next station or its destination after an accident or incident, the railroad must consider the safety and convenience of passengers in determining whether the crew is immediately available for testing. A relief crew must be called to relieve the train crew as soon as possible.

(4) Covered employees who may be subject to testing under this subpart must be retained in duty status for the period necessary to make the determinations required by § 219.201 and this section and (as appropriate) to complete the specimen collection procedure. An employee may not be recalled for testing under this subpart if that employee has been released from duty under the normal procedures of the railroad, except that an employee may be immediately recalled for testing if—

(i) The employee could not be retained in duty status because the employee went off duty under normal carrier procedures prior to being contacted by a railroad supervisor and instructed to remain on duty pending completion of the required determinations (e.g., in the case of a dispatcher or signal maintainer remote from the scene of an accident who was unaware of the occurrence at the time the employee went off duty);

(ii) The railroad's preliminary investigation (contemporaneous with the determination required by § 219.201) indicates a clear probability that the employee played a major role in the cause or severity of the accident/incident; and

(iii) The accident/incident actually occurred during the employee's duty tour. An employee who has been transported to receive medical care is not released from duty for purposes of this section. Nothing in this section prohibits the subsequent testing of an employee who has failed to remain available for testing as required (i.e., who is absent without leave); but subsequent testing does not excuse such refusal by the employee timely to provide the required specimens.

(c) *Place of specimen collection.* (1) Employees must be transported to an independent medical facility where the specimens must be obtained. The rail-

road must pre-designate for such testing one or more such facilities in reasonable proximity to any location where the railroad conducts operations. Designation must be made on the basis of the willingness of the facility to conduct specimen collection and the ability of the facility to complete specimen collection promptly, professionally, and in accordance with pertinent requirements of this part. In all cases blood may be drawn only by a qualified medical professional or by a qualified technician subject to the supervision of a qualified medical professional.

(2) In the case of an injured employee, the railroad must request the treating medical facility to obtain the specimens.

(d) *Obtaining cooperation of facility.* (1) In seeking the cooperation of a medical facility in obtaining a specimen under this subpart, the railroad shall, as necessary, make specific reference to the requirements of this subpart.

(2) If an injured employee is unconscious or otherwise unable to evidence consent to the procedure and the treating medical facility declines to obtain blood specimens after having been acquainted with the requirements of this subpart, the railroad must immediately notify the duty officer at the National Response Center (NRC) at (800) 424-8801 or (800) 424-8802, stating the employee's name, the medical facility, its location, the name of the appropriate decisional authority at the medical facility, and the telephone number at which that person can be reached. FRA will then take appropriate measures to assist in obtaining the required specimen.

(e) *Discretion of physician.* Nothing in this subpart may be construed to limit the discretion of a physician to determine whether drawing a blood specimen is consistent with the health of an injured employee or an employee afflicted by any other condition that may preclude drawing the specified quantity of blood.

#### § 219.205 Specimen collection and handling.

(a) *General.* Urine and blood specimens must be obtained, marked, preserved, handled, and made available to